No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1942

MARICOPA COUNTY, ARIZONA; W. H. LINVILLE, as County Treasurer, and Ex-Officio Tax Collector of Maricopa County, Arizona; J. D. BRUSH as County Assessor of Maricopa County, Arizona; CHARLES H. FIELDS, JOHN A. FOOTE and GEORGE FRYE, as members of and constituting the Board of Supervisors and County Board of Equalization of Maricopa County, Arizona; PIMA COUNTY, ARIZONA; WALLACE S. BRANSFORD, as County Treasurer and Ex-Officio Tax Collector of Pima County, Arizona; THOMAS COLLINS, R. H. MARTIN, and J. B. MEAD, as members of and constituting the Board of Supervisors and County Board of Equalization of Pima County, Arizona.

Petitioners,

vs.

THE VALLEY NATIONAL BANK OF PHOENIX, a national banking association,

Respondent.

BRIEF ON BEHALF OF RESPONDENT

On Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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Arizona Constitution and Statutes Cited

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No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1942

MARICOPA COUNTY, ARIZONA; W. H. LINVILLE, as County Treasurer, and Ex-Officio Tax Collector of Maricopa County, Arizona; J. D. BRUSH as County Assessor of Maricopa County, Arizona; CHARLES H. FIELDS, JOHN A. FOOTE and GEORGE FRYE, as members of and constituting the Board of Supervisors and County Board of Equalization of Maricopa County, Arizona; PIMA COUNTY, ARIZONA; WALLACE S. BRANSFORD, as County Treasurer and Ex-Officio Tax Collector of Pima County, Arizona; THOMAS COLLINS, R. H. MARTIN, and J. B. MEAD, as members of and constituting the Board of Supervisors and County Board of Equalization of Pima County, Arizona,

Petitioners,

VS.

THE VALLEY NATIONAL BANK OF PHOENIX, a national banking association,

Respondent.

BRIEF ON BEHALF OF RESPONDENT

Outline of Brief

A. PETITIONERS ARE NOT WITHIN THE CONSTITUTIONAL PROTECTION WHICH THEY ASSERT

1. The rights of the two petitioners which are counties

(a) The counties are not necessary parties to these suits and have no independent rights therein

(b) Counties are mere instrumentalities of the state and can acquire no vested right to property independent of their creator, the state

2. The rights of the two petitioners who are county treasurers

(a) The county treasurers have no rights as individuals

(b) The county treasurers, when engaged in the collection of taxes are agents of the state of circumscribed and limited powers and without the approval of the duty constituted authorities of the state, cannot engage in a controversy with the national government by attacking the validity of an act of Congress for the purpose of subjecting an agency of the federal government to the payment of state taxes

3. The Boards of Supervisors who are petitioners are merely the governing board of the county and clearly have no rights independent of their counties

4. The states of the United States are not persons within the meaning of the due process clause of the Fifth Amendment to the Federal Constitution

(a) The only judicial opinions we have found are to the effect that the states do not come within the meaning of the due process clause of the Fifth Amendment

(b) It is established by numerous decisions in the state and Federal Courts that public corporations such as counties, municipalities and school districts are not protected by

the due process clause of the 14th Amendment to the Federal Constitution nor by the due process clauses in their respective state constitutions.

(c) While the word person may be construed so as to include the United States, the state or any corporation or entity, this is not its natural construction and it should not be so construed unless such construction is clearly within the purpose of the enactment

(d) States are sovereign and the principles that govern their rights and liabilities are not the same as the principles that govern the rights and liabilities of citizens

(e) The 5th Amendment came into the Constitution as a part of the bill of rights consisting of the first nine amendments to the Constitution, the several provisions of which were adopted from the then existing provisions of the constitutions of the states and were originally taken from the English Declarations of Rights and were directed toward protection of the rights of individuals and not toward the division of power between the state and national government

(f) The Constitution throughout clearly distinguishes between the states and the people and persons. There is no indication that the same distinction was not clearly preserved in the first ten amendments

(g) It is clear beyond question that the proponents of the Fifth Amendment did not have in mind its application to the states when it was adopted. It has not been so extended during the century and a half that has elapsed since its adoption. To now extend the same to a situation not contemplated upon its adoption is likely to result in undesirable consequences

5. The Tenth Amendment has no application to this case for the reason that the taxation of the shares of national banks is not reserved to the states

B. THE RETROACTIVE PROVISIONS OF THE ACT OF CONGRESS OF MARCH 20TH, 1936, DID NOT DEPRIVE PETITIONERS OF ANY VESTED RIGHTS

1. The consent of Congress to the taxation of the shares of stock of national banks was a gratuity which could be withdrawn at any time before the tax was actually collected

2. An act correcting an inadvertent defect in legislation and preventing a person from realizing a gain from such inadvertent defect does not deprive him of property without due process of law

3. The so-called retroactive provisions of the Act of Congress of March 20th, 1936, are in fact not retroactive. They merely apply to an existing situation and prevent collection of taxes levied before it was passed

4. The Act of March 20th, 1936, is in effect the withdrawal of a right to collect taxes from Reconstruction Finance Corporation, a wholly owned government instrumentality. Such right of withdrawal of collection is the equivalent of withdrawal of consent to sue the United States

5. The 1936 tax which is enjoined in case E-350 was not levied until after the Act of March 20th, 1936, became effective and so cannot possibly be held to have been a vested right when said act was passed

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ARGUMENT

(Figures in parentheses preceded by the letter R refer to page numbers of the printed record)

In granting the writ the court requested counsel to "discuss in their briefs and on the oral argument the question whether petitioners, who are counties, are within the constitutional protection which they assert." but did not indicate whether the briefs and argument should be limited to this point. We, therefore, present first our arguments and authorities in compliance with the Court's direction, and follow with other arguments and authorities, including those presented in our brief filed in opposition to the petition for the writ, hoping it will serve the convenience of the Court to have our whole case set forth in a single brief. The injunction granted by the District Court in each case runs only against the county treasurers (R. 266, 333) who are the necessary parties and such treasurers claim to act under authority from the state as well as their respective counties, hence the scope of this brief is extended to include discussion of the constitutional rights of all the petitioners, both in their indivdual and representatve capacities.

A. PETITIONERS ARE NOT WITHIN THE CONSTITUTIONAL PROTECTION WHICH THEY ASSERT

1. *The rights of the two petitioners which are counties.*

(a) *The counties are not necessary parties to these suits and have no independent rights therein.*

While under the Arizona system, generally speaking, the assessment, levy and collection of taxes for the state and all of its subdivisions is entrusted to the officers of the respective counties, subject to supervision in certain respects by the State Board of Equalization and State Tax Commission and such taxes when col-

lected are distributed to the state, county, school districts and other taxing districts (Articles 4 to 8, both inclusive, Chapter 73 Ariz. Ann. Code 1939), the county treasurers in collecting such taxes act as agents of the state and not the counties, and the statutory lien for such taxes is the lien of the state and not the lien of the counties.

Conway vs. Mosher,
55 Ariz. 307, 311; 101 Pac. (2) 209

Yuma County vs. Arizona,
56 Ariz. 310, 312; 107 Pac. (2) 374

These cases hold, notwithstanding the fact that until tax deed is issued the county treasurer has charge of the disposition of property sold under tax lien.

Sec. 73-817 Ariz. Ann. Code 1939 (see appendix page XVII).

and after tax deed is issued to the state, the board of supervisors of the county has control of the disposition of such property,

Sec. 73-838, Sec. 73-839, Ariz. Ann. Code 1939 (see appendix page XVII).

and the county receives its proper proportion of the money received upon sale of the property,

Sec. 73-839 Ariz. Ann. Code 1939 (see appendix page XVIII).

The county is so lacking in interest in the subject matter that it can assert no right under the tax lien to property sold to the state for taxes and its presence as a party to a suit attacking the validity of a tax sale is of no effect.

The interpretation of the state statutes by the Supreme Court of Ariozna is, of course, binding on this Court.

Chicago M. St. P. & P. R. Co. vs. Risty,
276 U.S. 567; 72 L.ed. 703; 48 S.Ct.Rep. 396

Sioux County vs. National Surety Co.,
276 U.S. 238; 72 L.ed. 547; 48 S.Ct.Rep. 239.

It is, therefore, clear that petitioners Maricopa and Pima Counties are not entitled to assert that the judgments appealed from in these cases violate any constitutional rights of the two petitioners, which are counties.

(b) *Counties are mere instrumentalities of the state and can acquire no vested right to property independent of their creator, the state.*

While under the Arizona constitution counties are bodies politic and corporate,

Sec. 1 Article XII Arizona Constitution (see appendix page IX).

and by statute may sue or be sued in their corporate names.

Secs. 17-201, 17-202 Ariz. Ann. Code 1939 (see appendix page XII).

Their powers are limited to the purposes of their creation as instrumentalities of the state,

Hartford Accident & Indemnity Co. vs. Wainscott, 41 Ariz. 439, 445; 19 Pac. (2) 328.

It is the general rule that such instrumentalities of the state do not have the power to assert independent constitutional rights.

State of Maryland vs. Baltimore & Ohio R.R. Co., 3 Howard 534, 550.

Rogers Locomotive Works vs. American Emigrant Co., 164 U. S. 559, 576; 41 L. ed. 552.

State vs. Baltimore & Ohio R.R. Co.,
12 Gill & J. 399; 38 Am. Dec. 319.

Albright vs. Board of Commissioners,
194 Pac. 913, 915 (Kan.).

Riley vs. Stack,
18 Pac. (2) 110, 111 (Cal.).

People vs. Crennan,
36 N. E. 187, 189 (N. Y.).

Herrick vs. Cherokee Co.,
202 N. W. 252 (Ia.).

Hewitt & Sons vs. Keller,
275 N. W. 94, 95 (Ia.).

State vs. Board of Commissioners,
189 N. W. 639, 641 (Neb.).

The rule of the foregoing cases is applied in Arizona.

Duke vs. Yavapai County,
24 Ariz. 567, 573; 211 Pac. 862.

The principle that the due process clause of the 14th Amendment and the due process clauses of state constitutions do not protect municipal corporations and other instrumentalities of the state, is established by numerous decisions.

Williams vs. Baltimore,
289 U. S. 36; 77 L. ed. 1015; 53 S. Ct. Rep. 431 (City).

Newark vs. New Jersey,
262 U. S. 192; 67 L. ed. 943; 43 S. Ct. Rep. 539 (City).

Palmcroft Development Co. vs. Phoenix,
46 Ariz. 200, 212; 49 Pac. (2) 626 (City).

Shelby vs. Pensacola,
151 So. 53 (Fla.) (City).

Waddell vs. Board of Directors,
175 N. W. 65 (Ia.) (School Dist.).

Lincoln School Dist. vs. Redfield School Dist., 283 N. W. 881 (Ia.).

Independent School Dist. vs. State Appeal Board, 299 N. W. 440 (Ia.).

A few cases hold that the due process clause of the state constitution applies to municipalities as to their proprietary functions but none so far as we are aware hold that it applies to municipal corporations as to their governmental functions.

State vs. Arnold, 42 Pac. (2) 976 (Mont.).

In Re Jensen, 59 N. Y. Supp. 653.

In view of the fact that Arizona counties have no power to exercise nongovernmental functions,

Hartford Accident and Indemnity Co. vs. Wainscott, 41 Ariz. 439; 19 Pac. (2) 328,

the principle of the Arnold and Jensen cases, supra, is not material tot his case. The Arizona statutes remain the same as they were when the Hartford Accident and Indemnity case, supra, was decided Secs. 17-203, 17-206 Ariz. Ann. Code 1939, (see appendix, page XII-XIV).

We think it is clear under the above authorities that the two counties which are petitioners herein are not such entities as have the legal right to claim the protection of the due process clause of the 5th Amendment.

2. *The rights of the two petitioners who are county treasurers.*

(a) *The county treasurers have no rights as individuals.*

The county treasurers as individuals clearly have no claim that they are being deprived of property.

The taxes the collection of which is enjoined by the judgments in these suits could in no way inure to their benefit and as they are in no way prejudiced by the judgments attacked by this appeal they have no right to assert the invalidity of the act of Congress on which the judgment is based. They are not defending for themselves but for their principals.

State vs. Baltimore & Ohio R. Co.,
3 Howard 534.

And as mere taxpayers and citizens of the county and state they have no power to set up any constitutional rights of the counties or the state.

Scott vs. Frazier,
258 Fed. 669, 670.

Massachusetts vs. Mellon,
262 U. S. 447; 67 L. ed. 1078;
43 S. Ct. Rep. 597.

That a taxpayer as such could not set up a constitutional right of the state appears to have been assumed as not subject to question by the Supreme Court in the Scott case on appeal.

Scott vs. Frazier,
253 U. S. 243; 64 L. ed. 883.

(b) *The County Treasurers when engaged in the collection of taxes are agents of the state of circumscribed and limited powers and without the approval of the duly constituted authorities of the state, cannot engage in a controversy with the national government by attacking the validity of an act of Congress for the purpose of subjecting an agency of the federal government to the payment of state taxes.*

It is settled by the Supreme Court of Arizona that the county treasurers though elected in the respective counties, Secs. 17-502, 17-505 Ariz. Ann. Code 1939

(see appendix, page XIV) and paid by the counties, Sec. 12-704, 12-709 Ariz. Ann. Code 1939 (see appendix, page X-XI), are agents of the state for the collection of taxes.

Conway vs. Mosher,
55 Ariz. 307, 311; 101 Pac. (2) 209.

Yuma County vs. Arizona,
56 Ariz. 310, 312; 107 Pac. (2) 374.

It is also established by the same authority that the board of supervisors of the county has control over the interest of the county in tax suits.

Pima County vs. Grosetta,
54 Ariz. 530, 539; 97 Pac. (2) 538.

But the Attorney General who is a constitutional officer, Sec. 1, Art. 5, Arizona Constitution (see appendix, page VIII) is by statute required to prosecute and defend in any court any cause wherein the state is a party or is interested.

Subdiv. 2, Sec. 4-502, Arizona Code 1939 (see appendix, page IX).

and appear for the state in any action in the courts of the United States.

Subdiv. 8, Sec. 4-502, Ariz. Code Ann. 1939 see appendix, page X).

With the exception of the Industrial Commission no official board, commission or other agency of the state, other than the Attorney General shall employ any attorney.

Sec. 4-503, Ariz. Ann. Code 1939 (see appendix, page X).

Under the above provision the Attorney General only has the right to represent the state or to employ assistants to represent the state.

Crane vs. Frohmiller,
45 Ariz. 490, 502; 45 Pac. (2) 955.

This does not prevent an officer of the state who is expressly given the power to direct the prosecution of certain kinds of actions from prosecuting an action of that kind by another attorney.

State vs. Hendrix,
124 Pac. (2) 768, 771 (Ariz.).

But county treasurers are not directed or authorized to prosecute or defend any suits whatever. Their duties are particularly prescribed by the statutes and their duties in the collection of taxes are limited to the customary procedure of collection, and sale of the property in case of delinquency in payment. County attorneys are given no authority to prosecute or defend any suits to which the county treasurers are parties as agents of the state,

Sec. 17-902 Ariz. Ann. Code 1939 (see appendix, page XV).

and the authority of boards of supervisors is limited to directing and controlling the prosecution and defense of actions to which the county is a party and undoubtedly does not extend to the interest of the state in such actions.

Pima County vs. Grosetta,
54 Ariz. 530, 539; 97 Pac. (2) 538.

So it seems clear there is no one before the court in this case who is authorized to assert that the State of Arizona is being deprived of its property in violation of the national Constitution.

It will probably be suggested that the county treasurer as a party-defendant is entitled to assert any defense the state may have. This, we believe, to be

unsound. The county treasurer is a county officer and a mere agent of the state whose state functions are limited to the collection of taxes. To allow him to assert that the state is being deprived of its property without due process by an act of Congress would be as ridiculous as it would be in a case such as North Dakota vs. Minnesota, 263 U. S. 365; 68 L. ed. 342; 44 S. Ct. Rep. 138, to allow a path master or road overseer to bring a suit on behalf of his state against a neighboring state because its acts flooded the roads in his charge.

3. *The Boards of Supervisors who are petitioners are merely the governing board of the county and clearly have no rights independent of their counties.*

Secs. 17-201, 17-702 Ariz. Ann. Code 1939.

Their right to defend suits and employ counsel for that purpose has been discussed above.

4. *The states of the United States are not persons within the meaning of the due process clause of the Fifth Amendment to the Federal Constitution.*

(a) *The only judicial opinions we have found are to the effect that the states do not come within the meaning of the due process clause of the Fifth Amendment.*

Scott vs. Frazier,
258 Fed. 669, 670.

Concurring opinion of Judge Offut in State Tax Commission vs. Baltimore National Bank, 199 Atl. 119, 125 (Md.).

(b) It is established by numerous decisions in the *State and Federal Courts that public corporations such as counties, municipalities and school districts*

are not protected by the due process clause of the 14th amendment to the Federal Constitution nor by the due process clauses in the respective state constitutions.

See cases cited under 1 (b) supra, pages 7-9 of this brief.

The interpretation placed upon the word person in the 5th Amendment and the 14th Amendment should be the same.

Heiner vs. Donnan,
285 U. S. 312; 76 L. ed. 772; 52 S. Ct. Rep. 358.

We recognize the fact that the cases which hold that the 14th Amendment has no application to counties, municipalities, school districts and other subdivisions of the state are based partly upon the ground that such subdivisions are creations of the state and subject to the state's control, while the states possess a sovereignty separate from the sovereignty of the United States so that there is a difference between the application of the due process clause of the state constitutions to the subdivisions of the state and the application of the Fifth Amendment to the state.

Burnet vs. Brooks,
288 U. S. 378; 77 L. ed. 844; 53 S. Ct. Rep. 457.

There is, however, a strong similarity in the two situations in that the language to be construed is the same and in each case the question is whether the word persons is to be construed so as to include a public corporation.

(c) *While the word person may be construed so as to include the United States, the state or any corporation or entity, this is not its natural construction and it should not be so construed unless such construction is clearly within the purpose of the enactment.*

United States vs. Cooper Corporation,
312 U. S. 600; 85 L. ed. 1071; 61 S. Ct. Rep. 742.

Georgia vs. Evans,
86 L. ed. 929 (adv.); 62 S. Ct. Rep. 972 (adv.).

Baker vs. Kirschnek,
176 Atl. 489, 491 (Pa.).

(d) *States are sovereign and the principles that govern their right and liabilities are not the same as the principles that govern the rights and liabilities of citizens.*

In its early history this Court, yielding to arguments that under our government sovereign and citizen were on an equality, held states were subject to suit in this Court by private citizens.

Chisholm vs. Georgia.
2 Dallas 419.

The error was corrected by the 11th Amendment which prevents states from being placed in the same category as private individuals or private corporations.

(e) *The 5th Amendment came into the Constitution as a part of the bill of rights consisting of the first nine amendments to the Constitution, the several porvisions of which were adopted from the then existing provisions of the constitutions of the states and were originally taken from the English Declarations of Rights and were directed toward protection of the rights of individuals and not toward the division of power between the state and national government.*

It is a matter of history that the Bill of Rights, consisting of the first nine amendments to the Constitution, was not created by the Congress that proposed its adoption. In substance, at least, these several pro-

visions for protection against public authority already existed in most of the constitutions of the thirteen original states. When the adoption of a bill of rights was proposed in the Constitutional Convention it was suggested that its preparation would be a simple matter as the material therefor was available in the existing state constitutions.

Madison's Journal, as edited by E. H. Scott, page 717.

The Constitutional Convention did not authorize its preparation, but many of the states, upon their ratification of the Constitution, protested against the absence of a bill of rights and the demand therefor was so insistent that it was proposed by the first Congress and promptly ratified by the states. The several amendments were probably prepared by Madison.

Hughes—The Supreme Court of the U. S., 160, 187.

but the substance theerof came from the English Petition of Rights.

The due process clause of the Fifth Amendment apparently was first used in the statute of 28 Edward III and probably first appeared in the U. S. in an act of 1692 of the General Court of Massachusetts Bay. But, for the most part, before the adoption of the Fifth Amendment the Declarations of Rights during the Revolutionary period beginning with that of Virginia, had used the phrase of Magna Charta, "the law of the land." With few exceptions the phrase, "due process of law," is now found in all state constitutions.

Hughes—The Supreme Court of the U. S., 185.

The significance of this history is that the protection against deprivation of property without due process of law had its origin in the fear of the individual

against oppression by the government, a protection which was already provided against the state by the state constitutions and was desired also against the new Federal Government. Outside of the 10th Amendment there is no indication of any intent to protect the state governments against the newly created national government, and in the 10th Amendment where encroachment against state governments is provided for, the states are clearly and specifically mentioned.

(f) *The Constitution throughout clearly distinguishes between the states and the people and persons. There is no indication that the same distinction was not clearly preserved in the first ten amendments.*

There is no confusion in the use of the words state, people and person in the Constitution or the first ten amendments. The words are used in their natural meaning throughout. The word state is found in

Sections 2, 3, 4, 8, 9, 10, Article I,
Sections 1 and 2, Article II,
Section 2, Article III,
Sections 1, 2, 3, 4, Article IV,
Article V,
Article VI,
Article VII,

and is found in the first ten amendments only once, that being in the Tenth Amendment.

The word people is found only in the Preamble, but is found in the first ten amendments five times.

The word person is found in

Sections 2, 3, 6, 7, 9, Article I,
Section 1, Article II,
Section 3, Article III,
Section 2, Article IV,

and is found only twice in the first ten amendments, both instances being in the Fifth Amendment.

It would be strange, indeed, if the same statesmen who framed the Constitution and who throughout that instrument and the first ten amendments said "state," whereby they meant "state," and "people" where they meant "people," and "person" where they meant "person," would carelessly use the word person as inclusive of the states. The frequent use of the word people in the first ten amendments shows it was the protection of individuals and not states to which their minds were directed in the Bill of Rights.

(g) *It is clear beyond question that the proponents of the Fifth Amendment did not have in mind its application to the states when it was adopted. It has not been so extended during the century and a half that has elapsed since its adoption. To now extend the same to a situation not contemplated upon its adoption is likely to result in undesirable consequences.*

To extend the language of an enactment beyond its original contemplation is always hazardous. Perhaps no action of the Supreme Court has met with more criticism than the extension of the due process clause to private corporations. To again extend the same to the new field of state and federal relationships might very well result in serious complications.

Technical rules adopted to protect the individual against spoilation assume a new importance and are often deemed oppressive in themselves when extended to great corporations by judicial construction. Such technical rules have no place in determining rights between sovereignties. It has long been recognized that in determining rights between states, the Supreme Court applies Federal Law, State Law and International Law as the exigencies of the particular case may require.

Kansas vs. Colorado,
185 U. S. 125-146; 46 L. ed. 838; 22 Sup Ct. Rep. 552.

In such cases between the states it would be wholly inappropriate to apply the same system of municipal law that applies between individuals in all its details. This court long ago pointed this out in the following words:

"But the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between states the same system of municipal law in all its details which would be applied between individuals. If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the states sanctioned by the legislature of the United States.

"The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new. * * * But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a state. It hardly can be that we should be justified in declaring statutes ordaining such action void in every instance where the Circuit Court might intervene in a private suit, upon no other ground than analogy to some selected system of municipal law, and the fact that we have jurisdiction over controversies between states."

Missouri vs. Illinois,
200 U. S. 496, 520-521; 50 L. ed. 572; 26 S. Ct. Rep. 268.

As new fields of controversy were being opened between the states it was said a system of what may be called interstate law, relating to the rights and obligations of the states inter sese, was being developed.

> Hughes—The Supreme Court of the U. S., pages 140, 141,

and this Court, in considering such cases, has frequently reasserted the principle of the declaration of Justice Holmes in the case of Missouri vs. Illinois, quoted above.

See:

> Connecticut vs. Massachusetts,
> 282 U. S. 660; 75 L. ed. 602; 51 S. Ct. Rep 286.
>
> Kansas vs. Colorado,
> 206 U. S. 46, 97; 51 L. ed. 956; 27 St. Ct. Rep. 655.
>
> North Dakota vs. Minnesota,
> 263 U. S. 365; 68 L. ed. 342; 44 S. Ct. Rep. 138.

Section 2 of Article III of the Constitution gives this Court jurisdiction of cases between states and the United States as well as cases between states. This jurisdiction between nation and state has been less exercised than that between the states. Recent legislation of Congress, bringing nation and state into legislative and financial co-operation, is destined to bring such litigation into prominence. Thus the Reclamation Act brought the intervention of the United States in Kansas vs. Colorado, 206 U. S. 46, 97; 51 L. ed. 956; 27 S. Ct. Rep. 655.

The Maternity Act gave rise to Massachusetts vs. Mellon, 262 U. S. 447; 67 L. ed. 1078; 43 S. Ct. Rep. 597.

The act permitting states to tax shares of national banks gave rise to Baltimore National Bank vs. State

Tax Commission, 297 U. S. 209; 80 L. ed. 586; 56 S. Ct. Rep. 417.

The Home Owners' Loan Act gave rise to Hopkins Federal Savings and Loan Association vs. Cleary, 296 U. S. 316; 80 L. ed. 251; 56 S. Ct. Rep. 417; and the Federal Water Power Act gave rise to the case of United States vs. Appalachian Electric Power Co., 311 U. S. 377; 85 L. ed. 243; 61 S. Ct. Rep. 291.

Other cases in which no issue was framed between state and nation indicate further possibilities of this character of controversies.

Steward Machine Co. vs. Davis,
301 U. S. 548-618; 81 L. ed. 1279; 57 S. Ct. Rep. 883 (Federal Social Security Act).

United States vs. Bekins,
304 U. S. 27; 82 L. ed. 1137; 58 S. Ct. Rep. 811 (Municipal Bankruptcy Act).

James Stewart & Co. vs. Sadrakula,
309 U. S. 94; 84 L. ed. 596; 60 S. Ct. Rep 431 (State Labor Law on Federal Site).

Frahn vs. Tennessee Valley Authority,
41 Fed Supp. 83 (Tennessee Valley Authority Act),

Morris vs. Duby,
274 U. S. 135; 71 L. ed. 967; 47 S. Ct. Rep. 548 (Federal Highway Act).

In all cases of this kind there is present the "larger issue between federal and state authorities functioning as a harmonious whole."

Chicago vs. Fieldcrest Dairies,
86 L. ed. 888, 891 (Adv.).

The injection into that class of cases at this late day of the provisions of a Bill of Rights adopted to protect

private individuals against the possibility of a despotic government, seems clearly inadvisable.

The argument may be advanced that this case does not present a controversy between the taxing power of the state and federal government, but merely a private controversy between the two counties and the bank. Such is not the case. The taxes are levied upon the shares of stock owned by Reconstruction Finance Corporation. The bank is merely paying agent.

Sec. 73-205 Ariz. Ann. Code 1939 (see appendix, page XVI).

Federal Land Bank vs. Yuma County,
42 Ariz. 45; 22 Pac. (2) 405.

Gibbons vs. White,
47 Ariz. 180; 54 Pac. (2) 555.

It is true that this case involves only a money issue and so appears to be readily capable of being disposed of by application of the principle of vested rights, but such is not the case. The government is bound to consider the rights and equities of the other 47 states and the thousands of other counties and ought not to be compelled under the pretext of due process to recognize the claim of petitioners because the statutory lien attached January 1st to the prejudice of others whose lien attached April 1st.

5. *The Tenth Amendment has no application to this case for the reason that the taxation of the shares of national banks is not reserved to the states.*

The foregoing argument and the authorities in support thereof apply as well to the individual claims of the several petitioners under the Tenth Amendment as under the Fifth Amendment. If, however, it should be deemed by this court that any of said petitioners sufficiently represent the state to assert the state's

rights under the Federal Constitution, it is necessary to consider the claim of the state under the Tenth Amendment separately from what we have above said as to its claim under the Fifth Amendment, for the reason that the Tenth Amendment expressly mentions the states and undoubtedly the State of Arizona has the right to make claim to any protection that amendment offers. The Tenth Amendment does not create any rights in the states. It is merely a declaration that the powers which the states have not delegated to the Federal Government by the Constitution are retained by them. It follows that the claim by the petitioners on behalf of the state under the Tenth Amendment merely presents the proposition that the Act of Congress of March 20, 1936, in some respects goes beyond the power delegated to the Federal Government by the Constitution. In order to determine whether this is true it is necessary to examine the authorities upon the question of the taxation of shares of stock of national banks.

Prior to the adoption of the present National Bank Act, two cases determined that the old Bank of the United States was a federal instrumentality and that its operations were beyond the power of state taxation by virtue of implied prohibition of the federal constitution without the aid of federal legislation.

McCulloch vs. Maryland,
4 Wheaton 316; 4 L. ed. 579 (1819).

Osborn vs. Bank,
9 Wheaton 738; 6 L. ed. 204 (1824).

The present National Bank Act (12 USCA 21-200), was adopted February 25, 1863. As adopted at that date it contained no provision for taxation. It was amended by the Act of June 3, 1864, and as so amended

it contained a provision which was the basis for the present law to the effect that the banks should not be taxed except upon their real estate and their shares of stock might be taxed to their shareholders at a rate not in excess of the taxation of other moneyed capital. Undoubtedly this provision was based upon the statement of Chief Justice Marshall in the McCulloch case. Within two years after its adoption it came before the consideration of the Supreme Court of the United States in Van Allen vs. Assessors, 3 Wallace, 573; 18 L. ed. 229 (1866). This was followed closely by the case of Bradley vs. Illinois, 4 Wallace 459; 18 L. ed. 433 (1867), and it has subsequently been before the Supreme Court for consideration upon numerous occasions.

People vs. Weaver,
100 U. S. 539, 543; 25 L. ed. 705 (1880).

First National Bank of Gulf Port vs. Adams,
258 U. S. 362; 42 Sup. Ct. Rep. 323; 66 L. ed. 661 (1922).

National Bank of Redemption vs. Boston,
125 U. S. 60; 8 S. Ct. Rep. 772; 31 L. ed. 689 (1888).

Owensboro National Bank vs. Owensboro,
173 U. S. 664; 10 S. Ct. Rep. 537; 43 L. ed. 850 (1899).

Bank of California vs. Richardson,
248 U. S. 476; 39 S. Ct. Rep. 165; 63 L. ed. 372 (1919).

Des Moines National Bank vs. Fairweather,
263 U. S. 103; 44 S. Ct. Rep. 23; 68 L. ed. 191 (1923).

First National Bank vs. Anderson,
269 U. S. 341; 46 S. Ct. Rep. 135; 70 L. ed. 295 (1925).

First National Bank vs. Hartford,
273 U. S. 548; 47 S. Ct. Rep. 462; 71 L. ed. 767 (1927).

Baltimore Nat. Bank vs. State Tax Commission,
297 U. S. 209; 56 S. Ct. Rep. 417; 80 L. ed. 586 (1936).

There are many more cases. The above are given here to show that beginning with the case of Van Allen vs. Assessors, supra, the cases all lay down the rule that the provision of the federal statute is the exclusive grant of power to the states to tax national banks either on their stock or as otherwise permitted by the statute, and that beginning with the case of People vs. Weaver, supra, the cases have all laid down the rule more or less positively that there is no power in the states to tax the stock of national banks without the consent of Congress as expressed in the federal statute. In the more recent cases the Supreme Court of the United States has shown a tendency to limit the exemption of federal instrumentalities from taxation by implication from the constitution itself and to emphasize the power of Congress to exempt federal instrumentalities by legislation.

State of Alabama vs. King & Boozer,
62 S. Ct. Rep. 43 (Adv.); 86 L. ed. 1 (Adv.).

Pittman vs. Home Owners' Loan Corp.,
308 U. S. 21; 60 S. Ct. Rep. 15; 84 L. ed. 11.

Federal Land Bank vs. Priddy,
295 U. S. 229; 55 S. Ct. Rep. 705; 79 L. ed. 1408.

Smith vs. Kansas City Title & Trust Co.,
255 U. S. 180; 65 L. ed. 577; 41 S. Ct. Rep. 243.

Federal Land Bank vs. Bismarck Loan Co.,
62 Sup Ct. Rep. 1 (Adv.); 86 L. ed. 46 (Adv.).

But the doctrine of exemption from taxation by implication from the constitution itself, while limited by the more recent decisions, still remains. The decision in the case of Baltimore Nat. Bank vs. State Tax Commission, supra, which is the last case upon the question of exemption from taxation of shares of national banks, was placed squarely upon the proposition that the implied constitutional exemption had been waived by an Act of Congress.

For the purposes of this case it is wholly immaterial whether the exemption is rested upon implication from the constitution or upon prohibition by an act of Congress. The Act of March 20, 1936, is a prohibition as well as a withdrawal of consent. The significance of the long line of cases above cited lies in the fact that they establish beyond question that the power to grant or withhold taxation of national bank shares is not a power reserved to the states, but is a power granted to Congress as an incident to the power of creating such banks, which is implied from the major powers expressly granted by the Federal Constitution, as was so ably pointed out by Chief Justice Marshall in McCulloch vs. Maryland, supra. Appellants, being forced to admit that Congress may grant or withhold taxation of national bank shares, take the position that Congress may provide that the states shall not levy a tax on national bank shares, but that it cannot prevent the collection of a tax already levied upon such shares. This position cannot be maintained. Where a power exists in Congress the means by which, the manner in which, and the extent to which it may be exercised, rests in the discretion of Congress.

McCulloch vs. Maryland,
4 Wheaton 316, 423; 4 L. ed. 579.

Courts can not impose any limitations in these respects. Such limitations do not exist unless they are imposed by the Constitution. No constitutional limitations of this power are pointed out except the asserted limitation of the due process clause of the Fifth Amendment, which we have shown does not apply.

The power of exempting federal agencies from taxation stems from the necessity of preserving them. This necessity may require the prevention of the collection of a tax already levied.

It is clear from the foregoing authorities that from McCulloch vs. Maryland (1819) to Federal Land Bank vs. Bismarck Loan Co. (1941) the cases uniformly hold that granting or withholding taxation of national bank shares is not a power reserved to the states but is a power granted to Congress by the Federal Government. The manner in which, the means by which and the extent to which said power shall be exercised rests in the discretion of Congress.

B. THE RETROACTIVE PROVISIONS OF THE ACT OF CONGRESS OF MARCH 20TH, 1936, DID NOT DEPRIVE PETITIONERS OF ANY VESTED RIGHTS.

1. *The consent of Congress to the taxation of the shares of stock of national banks was a gratuity which could be withdrawn at any time before the tax was actually collected.*

The Circuit Court of Appeal did not find it necessary to consider the application of the Fifth Amendment to states and subdivisions of states but disposed of the case upon the ground that it was settled by the decisions of this Court that since shares of stock in national banks were subject to state taxation only by the consent of Congress taxation of such shares with

the consent of Congress was a privilege or gratuity that might be withdrawn at any time before collection of the tax and that when so withdrawn the right to such collection ceased. The Court followed in this respect the opinion of the District Court of Georgia in the case of Reconstruction Finance Corporation vs. Elder, 26 F. Supp. 772, which decision is amply supported by the decisions of this Court.

Shares of stocks of national banks can be taxed by the states only with the consent of Congress.

Van Allen vs. Assessors,
3 Wallace 573; 18 L. ed. 229.

Bradley vs. Illinois,
4 Wallace 459; 18 L. ed. 433.

People vs. Weaver,
100 U. S. 539, 543; 25 L. ed. 705.

Owensboro National Bank vs. Owensboro,
173 U. S. 664; 19 S. Ct. Rep. 537; 43 L. ed. 850.

Bank of California vs. Richardson,
248 U. S. 476, 482-484; 39 S. Ct. Rep. 165; 63 L. ed. 372.

First National Bank vs. Adams,
258 U. S. 362, 364; 42 S. Ct. Rep. 323; 66 L. ed. 661.

Des Moines National Bank vs. Fairweather
263 U.S. 103, 106, 44 Sup. Ct. Rep. 23, 68 L.ed 191.

First National Bank vs. Anderson,
269 U. S. 341, 347; 46 S. Ct. Rep. 135; 70 L. ed. 295.

First National Bank vs. Hartford,
273 U. S. 548; 47 S. Ct. Rep. 462; 71 L. ed. 767.

Baltimore National Bank vs. State Tax Commission,
297 U. S. 209; 56 S. Ct. Rep. 417; 80 L. ed. 586.

A privilege or gratuity granted or conferred by the United States may be withdrawn at any time by act of Congress.

Lynch vs. U. S.,
292 U. S. 571; 78 L. ed. 1434, 1439; 54 S. Ct. Rep. 840.

DeGroot vs. U. S.,
5 Wallace 419; 18 L. ed. 700.

U. S. vs. Teller,
107 U. S. 64, 68; 27 L. ed. 352.

Frisbie vs. U. S.,
157 U. S. 160, 162; 39 L. ed. 657.

U. S. vs. Cook,
257 U. S. 523; 66 L. ed. 350, 351; 42 S. Ct. Rep. 200.

Van Horn vs. Hines,
122 F. (2) 207; certiorari denied, 62 S. Ct. Rep 350 (Adv.); 86 L. ed. 257 (Adv.).

Salt Co. vs. E. Saginaw,
13 Wallace 373; 20 L. ed. 611.

Dodge vs. Board of Education,
302 U. S. 74; 82 L. ed. 57; 58 S. Ct. Rep. 98.

Petitioners seek to avoid the force of the above authorities by contending that the cases permitting withdrawal of privileges or gratuities do not apply because withdrawal of the consent to tax after the lien of the tax has attached may interfere with the orderly collection of the state's revenue. That is an argument more properly addressed to Congress than to the courts. As pointed out by the above cases the power to tax the property of the United States is withdrawn from the states by the Federal Constitution.

In creating Reconstruction Finance Corporation, Congress did not set up an organization out of which

the United States was to make a profit. The purpose of that act was to assist the several states and the citizens thereof to survive the depression. The purpose of the particular Act authorizing Reconstruction Finance Corporation to purchase preferred stock of national banks is well stated in the extract from Judge Offutt's opinion in the case of Tax Commission vs. Baltimore National Bank, supra, quoted in the appendix to this brief.

The consent of Congress to state taxation of preferred bank stock held by Reconstruction Finance Corporation found to have been granted by the decision of this court in Baltimore National Bank vs. State Tax Commission, 297 U. S. 209; 56 S. Ct. Rep. 417; 80 L. ed. 586, in fact operated as the grant of a double gratuity. The federal government first supplied the use of the funds with which to purchase the shares, and, second, permitted the states to tax the shares purchased with the funds advanced for that particular purpose. Thus the United States first put the money into the local communities for the purpose of saving those communities from all the evils of closed banks, and, second, consented that the local authorities tax this money which had been put into the communities for their benefit. The granting of this second gratuity through consent to state and local taxation was due wholly to the failure of Congress to have in mind or correctly apprehend the effect of its former legislation permitting the taxation of shares of stock of national banks.

2. *An act correcting an inadvertent defect in legislation and preventing a person from realizing a gain from such inadvertent defect does not deprive him of property without due process of law.*

The Circuit Court of Appeals might well have mentioned the oversight of Congress as additional ground for upholding the validity of the Act of March 20, 1936, as was done by the District Court of the Northern Division of Georgia in the case of Reconstruction Finance Corporation vs. Elder, 26 Fed. Supp. 772, in which that court stated:

> "In my opinion, it is clear that the privilege to tax such stock standing in the name of Reconstruction Finance Corporation, a purely governmental agency, resulted from mere oversight on the part of Congress and that it was never the intention of Congress to permit the taxation of such shares when so owned; that this oversight was corrected as soon as possible after the Supreme Court decision, supra, by the passage of the Act of March 20, 1936, which expressly, and without ambiguity, undertakes to annul such privilege with respect to present, future and past assessments."

That the purpose of the Act of March 20, 1936, was to correct an inadvertent omission of Congress is made clear from the statement of the history of the Act inserted in the appendix to this brief.

In view of the history of said Act of March 20, 1936, its validity must be sustained on the principle of the following cases, which may be briefly stated as follows:

> "Congress has the power to correct an inadvertent defect in an act of legislation discovered by the administration thereof, or by decisions of the courts, and by such correction destroy existing causes of action arising out of the defect in the act where such causes of action are not supported by any substantial equity."

Graham vs. Goodcell,
282 U. S. 409, 426; 75 L. ed. 415, 439; 51 S. Ct. Rep. 186.

McNair vs. Knott,
302 U. S. 369; 82 L. ed. 307; 58 S. Ct. Rep. 245.

Paramino Lumber Co. vs. Marshall,
309 U. S. 370, 377; 84 L. ed. 814; 60 S. Ct. Rep. 600.

Carpenter vs. Wabash R. Co.,
309 U. S. 23, 27; 84 L. ed. 558; 60 S. Ct. Rep. 416.

Rafferty vs. Smith Bell & Co.,
257 U. S. 226; 66 L. ed. 208, 210; 42 S. Ct. Rep. 71.

United States vs. Heinszen & Co.,
206 U. S. 370, 386; 51 L. ed. 1098.

Charlotte Harbor & N. R. Co. vs. Wells,
260 U. S. 8; 67 L. ed. 100; 43 S. Ct. Rep. 3.

Phipps vs. School District of Pittsburgh,
111 Fed. (2) 393, 396.

The principle above stated certainly applies in the present case. The petitioners have no substantial equity in their favor. The money raised by the preferred shares which they sought to tax was brought into those counties to save their citizens from the unfortunate experience of closed banks and to provide them with proper banking facilities. The bringing in of such funds took from them no right to tax anything which they could tax before and the opportunity to tax preferred stock held by Reconstruction Finance Corporation was given them merely by an oversight of Congress, upon which they seized. Congress by the Act of March 20, 1936, merely deprived them of the opportunity to realize upon their efforts to tax the

preferred shares, which opportunity Congress never intended to bestow and which was withdrawn before it could be realized upon by even the most grasping.

Petitioners seek to make something out of the fact that the rights claimed by them are public in their nature. That does not better their case. The rule permitting the cancellation of causes of action by the correction of defects in legislation by subsequent action of the legislature is more liberal where only public rights will be affected by the curative measure.

Hodges vs. Snyder,
261 U. S. 600; 67 L. ed. 819; 43 S. Ct. Rep. 435.

Western Union Telegraph Co. vs. Louisville & N. R. Co.,
258 U. S. 13; 66 L. ed. 437; 42 S. Ct. Rep. 258.

State of Pennsylvania vs. Wheeling & Belmont Bridge Co.,
18 Howard 421; 15 L. ed. 449.

3. *The so-called retroactive provisions of the Act of Congress of March 20, 1936, are in fact not retroactive. They merely apply to an existing situation and prevent collection of taxes levied before it was passed.*

While we have discussed the Act of March 20, 1936, as though it were a retroactive act, particularly as applied to Case E-333 involving the 1935 taxes, as a matter of fact the act is not retroactive at all. It merely applies to a situation existing at its passage. "A statute is not retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them are drawn from a time antecedent to the enactment."

Reynolds vs. United States,
292 U. S. 443, 449; 78 L. ed. 1353; 54 S. Ct. Rep. 800.

Cox vs. Hart,
260 U. S. 427, 435; 67 L. ed. 332; 43 S. Ct. Rep. 154.

United States vs. Trans-Missouri Association,
166 U. S. 290, 342; 41 L. ed. 1007, 1028.

Congress frequently passes taxation acts imposing taxes for a period that has expired at the time of the enactment of the statute.

Untermeyer vs. Anderson,
276 U. S. 440, 447; 72 L. ed. 645; 48 S. Ct. Rep. 353.

Wagner vs. Leser,
239 U. S. 207; 60 L. ed. 230; 36 S. Ct. Rep. 66.

Seattle vs. Kelleher,
195 U. S. 351; 49 L. ed. 233; 25 S. Ct. Rep. 44.

The 1935 tax was not levied until September, 1935, six months before the passage of the Act of March 20, 1936, and the 1936 tax was not levied until September, 1936, six months after the passage of the Act of March 20, 1936. It seems highly inconsistent to say that Congress cannot make the withdrawal of its consent to a tax levy extend back for the same period that it can extend back its tax levy.

4. *The Act of March 20, 1936, is in effect the withdrawal of a right to collect taxes from Reconstruction Finance Corporation, a wholly owned government instrumentality. Such right of withdrawal of collection is the equivalent of withdrawal of consent to sue the United States.*

Of course, the bank is subject to suit under 12 U. S. Code Ann., Sec. 24, and the bank may be sued by each of the respective counties to collect the taxes claimed on its shares.

Brophy vs. Powell,
121 Pac. (2) 647, 654 (Ariz.).

A general power to sue and be sued was granted to Reconstruction Finance Corporation by 15 U. S. Code Ann., Sec. 604, but this general power was withdrawn so far as the collection of taxes on preferred shares of banks were concerned by the Act of March 20, 1936.

12 U.S. Code Ann., Sec. 51d.

In Lynch vs. United States, 292 U. S. 571; 78 L. ed. 1434, 1442; 54 S. Ct. Rep. 840, it was held that an act which in general terms repealed both the substantive rights of the beneficiaries of veterans' insurance policies and the right to sue thereon was directed primarily at the substantive right and not the right to sue, and hence it was held invalid, although, if it had been directed at the right to sue, it would have been held valid. The court expressly states:

> "Although consent to sue was thus given when the policy was issued Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn although given after much deliberation and for a pecuniary consideration."

It was held in United States vs. Alabama, 313 U. S. 274; 85 L. ed. 1327; 61 S. Ct. Rep. 1011, that a proceeding to collect a tax is a suit and that such a suit or proceeding cannot be maintained unless the United States has consented that it may be. The Act of March 20, 1936, does not, like the act construed in Lynch vs. United States, supra, take away a contractual right. It merely provides that preferred shares of national banks owned by Reconstruction Finance Corporation

shall not be subject to the taxing process of the states or their subdivisions whether such taxes have been or shall thereafter be levied. It seems to us that this is equivalent to a declaration that there shall be no tax proceedings on these shares of stock against the Reconstruction Finance Corporation. That such an agency may be clothed with the immunity of the government from suit is settled.

The result is that if appellants are permitted to collect the tax on the Reconstruction Finance Corporation preferred stock from appellee bank, the bank has no means of collecting the tax from Reconstruction Finance Corporation. It is settled that a bank can not be compelled to pay the taxes of its shareholders when it can not be reimbursed for the money paid.

Shainwald vs. First National Bank,
109 Pac. 257, 258 (Idaho).

Iowa Des Moines National Bank vs. Des Moines,
288 N. W. 409 (Ia.).

Rosenblatt vs. Johnston,
104 U. S. 462; 26 L. ed. 832.

Stapylton vs. Thaggard,
91 Fed. 93.

City of Boston vs. Beal,
51 Fed. 306.

Gibbons vs. White,
47 Ariz. 180; 54 Pac. (2) 555.

Andrew vs. Munn,
218 N. W. 526.

Public Nat. Bank of New York vs. Keating,
47 Fed. (2) 561, 562.

Cummings vs. National Bank,
101 U. S. 153, 157; 25 L. ed. 903.

Whitney National Bank vs. Parker,
41 Fed. 402.

5. The 1936 tax which is enjoined in case E-350 was not levied until after the Act of March 20, 1936, became effective and so can not possibly be held to have been a vested right when said act was passed.

The state provides that the lien shall attach on January 1st, but this lien is created merely for the purpose of defining the obligation between grantor and grantee.

United States vs. Alabama,
313 U. S. 274; 85 L. ed. 1327; 61 S. Ct. Rep. 1011.

The obligation to pay the tax is not perfected until it is levied.

New York vs. Maclay,
288 U. S. 290; 77 L. ed. 754; 53 S. Ct. Rep. 323.

See to the same effect:

Territory vs. Perrin,
9 Ariz. 316; 83 Pac. 361.

United States vs. Certain Lands in St. Louis,
29 Fed. Supp. 92, 95.

United States vs. Pierce County,
193 Fed. 529, 532.

Bannon vs. Burns,
39 Fed. 892, 898.

United States vs. Buffalo,
54 Fed. (2) 471, 473.

Gilmor vs. Dale,
75 Pac. 932.

Portland vs. Multnomah County,
296 Pac. 48, 49 (Ore.).

State vs. Snohomish County,
128 Pac. 667, 669 (Wash.).

City & County of Denver vs. Tax Research Bureau,
71 Pac. (2) 809, 811 (Colo.).

Appellants suggest that since it does not appear that the shareholder owned real property in the county, the taxes were collectible before the rate for the year 1936 was fixed. This is provided for by Sec. 73-410 Ariz. Ann. Code 1939, but such collection can take place only upon the assessment of the property. By Sec. 3074, Revised Code of 1928, the assessment may be made between the first Monday in January and the first day of May. There is no suggestion that the assessment in question was made before March 20th, the date of the passage of the Act of Congress. In fact, it appears from the amended complaint that the taxes were not assessed under this provision of the law, but under Sections 3096-3098, Revised Code of 1928. (R. 116, 121, 302, 304.)

It is thus clear in case No. E-350 that the 1936 taxes had not been assessed or levied when the Act of March 20, 1936, was passed.

CONCLUSION

In conclusion, we submit that Congress, by the enactment of the Reconstruction Finance Corporation Act, made extensive provisions to aid the states and their subdivisions to overcome the depression. These provisions were gratuities from the federal government to the states and their subdivisions, to meet a need which the local governments were unable to assume alone. Not the least of these beneficial provisions was the act authorizing the rehabilitation of banks by purchase of their preferred stock and debentures. In the enactment of this statute, Congress

overlooked the fact that the manner in which it rendered this aid subjected the donation to liability for state and local taxes by way of an unintended exception to the general principles of exemption of Reconstruction Finance Corporation from such taxation as written into the act. The rate of such taxation in the appellant counties was higher than the dividend rate Congress reserved for Reconstruction Finance Corporation. Consequently, the permission of such taxation might very well take up the entire earnings of the capital contributed for the preferred stock and destroy the whole purpose of the beneficent Act of Congress. Promptly after the error was pointed out by the Supreme Court, Congress corrected the same by the Act of March 20, 1936, and the great majority of the states and their subdivisions promptly recogniged the correction. A few resisted, but in those cases the courts upheld the corrective act. These appellants originally did not deny the validity of that act; they first sought to avoid its effect by denying its application (R. 154-155, 172-173), and now, on this appeal, are so reluctant to release their tentative grip upon the forced gift that they change their position to deny the power of the giver to limit the effect of his own gift. We submit the decision of the Circuit Court of Appeals should be affirmed.

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Appendix Follows

APPENDIX

Extract from the opinion of Judge Offutt in the case of State Tax Commission vs. Baltimore National Bank, 199 Atl. 127-128.

"As pointed out in State Tax Commission vs. Baltimore National Bank, 169 Md. 65, 77, 180 A. 260, the Finance Corporation may become, in a way, a partner in a business which it aids, and may share in the profits thereof. But those are mere incidents of its primary purpose and function which was to rehabilitate institutions which either had collapsed, or which without such aid would have collapsed, by granting credit and aid when all other sources of credit had dried up and there was no other aid.

"Mr. Jesse H. Jones, chairman of the corporation, in a statement in evidence under a stipulation, said that when the act was passed, out of a total of 24,600 banks in operation in 1930, 5,500 having deposits of three and a half billion dollars had been forced to suspend even before the bank holiday, and that after the holiday four billion dollars of additional deposits were tied up in nearly 4,200 unlicensed or restricted banks that had been open before the holiday but not thereafter. Depositors fearful for the safety of their funds steadily withdrew their deposits, the deposits of member banks of the Federal Reserve System declined by approximately seven billion dollars, many communities were without banking facilities, private lenders were unable or unwilling to supply additional capital to the banks, and the banks in turn were unable to supply the 'essential credit needs of business and industry which suffered accordingly.' Bank failures and suspensions were increasing, many states declared bank holidays, even the strongest banks were in danger, and the entire banking system of the nation was facing collapse.

"Whatever may be said of the danger that the swift currents of the ever-widening whirlpool of federal activities will carry beyond the taxing power of the states so much property as to threaten the very existence of our dual form of government, it cannot be denied that the primary and essential duty of the national government in that crisis was to prevent, if possible, the complete collapse of the nation's credit, irreparable damage to its commerce and industry, and the chaos and disorder which were likely to follow. Nor can it be denied that the Reconstruction Finance Corporation as the agency employed to grant that aid was an essential instrumentality of the national government created and existing to perform a governmental function of the highest possible importance. Every reason advanced by the courts in support of the immunity of national banks, and the Federal Reserve Bank from state taxation, applies with at least equal force to the Finance Corporation. Neither performs a function more immediately essential to the continuance and integrity of the national government, while on the other hand both are operated for private profit, and the stock of both is owned in part by private investors. Nor is there rational support for the theory that the use of the nation's resources to avert a common national disaster is beyond the natural and legitimate scope of the powers granted to the national government 'in order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare.'"

PURPOSE OF ACT OF CONGRESS MARCH 20, 1936

The Bill which culminated in the Act of March 20, 1926, came bofer the Congress under unanimous favorable reportf rom the appropriate Committee of each House. (Congressional Record, Vol. 80, pages 3965 and 4046.)

The measure was at all times treated as a remedial one for the avowed purpose of closing "an unintended legislative gap." This was taken for granted in the Senate and was soon made clear to the membership of the House by the leading members of the Committee on Currency and Banking. The statements to this effect in the record are so numerous that it would be exceeding tiresome to catalogue them.

On March 19, 1936, the day on which the curative measure was enacted by Congress and the day before it was approved by the President, Mr. Hancock of North Carolina said, in explaining the object and purpose of the law, the following:

> "This bill is sound, meritorious, and in the public interest. Its passage will merely restore to the Reconstruction Finance Corporation, an instrumentality of the Federal Government, its constitutional immunity from taxation, which immunity Congress unquestionably intended it should have at the time of the passage of the act in 1932. Its necessity arises as a result of a recent decision of the Supreme Court in the case of Baltimore National Bank against Maryland State Tax Commission, in which the Court held that Article X of the act specifically exempting the Corporation, its franchise, capital, reserves, surplus and income from taxation, both State and Federal, was not effective in the face of section 5219 of the Revised Statutes passed in 1864 which expressly authorizes States to tax national bank shares, within certain limitations, regardless of ownership. The immunity from taxation upon the passage of the bill applies to the R. F. C. alone because it is a Federal Agency. *The bill, therefore, does no more than to close an unintended legislative gap.* It will not in any way affect the rights of any State taxing authority or municipal authority to levy

taxes against the preferred stock, notes, or debentures held by any individual or other corporation." (Congressional Record, Vol. 80, page 4043.) (Italics supplied.)

On February 24, 1936, Senator Barkley, in explaining the object and purposes of the bill to the Senate, used these words:

"It is simply the correction of either an oversight, or lack of foresight, or lack of sufficiently broad language to cover what was sought to be covered. The Supreme Court said it was not covered and we are simply trying to correct the mistake."

On the same day Senator Adams said:

"The theory of the bill is to carry out the intent of Congress when the original banking act was enacted, that the stock held by the Reconstruction Finance Corporation should not be taxed. In no place, so far as I know, has there been payment of the tax." (Congressional Record, Vol. 80, page 2646.)

On the same day Senator Barkley made this further statement:

"It was thought that the Reconstruction Finance Corporation Act, which attempted to exempt from taxation this stock and the securities held by it, was broad enough to cover all sorts of securities it might hold including preferred stock in these banks. The Government made that contention in the lawsuit originating in Maryland and decided by the Supreme Court. The Court held that the language of the act was not broad enough to include this particular kind of security and therefore it was taxable. The bill is for the purpose of putting such securities on the same basis with any other securities held by the Reconstruction Finance

Corporation and all other governmental agencies like the land banks, the certain limitations, regardless of ownership." *Vol. 80 page 4043.*

Senator Robinson said:

"It occurs to me that the primary question to be solved in relation to this proposed amendment is, what was the original intention of Congress when, in order to save banks threatened with ruin, it authorized the Reconstruction Finance Corporation to purchase preferred stocks?

Of course, the Supreme Court has held, in the case referred to by the Senator from Michigan, that the language used in the act did not actually and legally relieve such preferred stocks from liability to tax by the States. That decision, of course, is conclusive and binding; but still the question arises as to what was actually the intention of the Congress. Did the Congress, at the time it authorized the Reconstruction Finance Corporation to purchase preferred stocks in banks for the purpose with which we are all more or less familiar, actually intend that such stocks should be subject to taxation by the States? If it did, the question as to whether this proposed legislation should be passed is different from that which arises in my mind if it is made clear that the original intention was to exempt such stocks from taxation. (Page 2648)

To my mind the answer to the whole argument is comprehended in the question I originally propounded, what was the actual intention of the Congress, taking into consideration the record that has been made and referred to here by the various Senators, and the further fact, which, in my judgment, is of itself controlling, namely, that the Reconstruction Finance Corporation was not created by the United States for the pur-

pose of making profit. It was created as an agency to save private industry and private organizations, so that it cannot be regarded as a profit-making organization, although I hope it will, at least in the long run, earn enough to offset such losses as may be made on the loans which have been negotiated.

If the Government did not intend when it created this corporation that its preferred stock should be taxed, if it placed that construction on it—and most of the States did the same thing—in my judgment the enactment of the proposed legislation is not only warranted, it is essential." (Congressional Record, Vol. 80 pages 2647 and 2649.)

Senator Barkley here interposed:

> "The Court's decision was based upon an old statute regulating national banks, a statute passed before the Reconstruction Finance Corporation was created, which, of course, gave consent of the Federal Government to the taxation of shares of national banks in the State. The Senator knows how impossible it is for us, in the passage of a new act, to specifically repeal or withdraw every exemption or every provision of an old act which may have been enacted before. There is no doubt but that when Congress passed the general legislation referred to by the Senator from New York, it intended that all of these securities, whatever was held by the Reconstruction Finance Corporation, outside of real estate, should be exempt from local taxation. The mere fact that the Court held that it was not broad enough or specific enough to do that it seems to me should not militate against the enactment of the pending bill correcting that, and making it specific in the law." Congressional Record Vol. 80, page 2649.

VII.

In the House Mr. Ford of California hit the nail on the head when he likened the situation of the Government allowing its own property to be taxed when in the hands of a concern which it had created to save the Country to the homely absurdity of allowing a man to punish a helpful stranger for saving him from destruction. He said the condition of affairs which would be left if Congress failed to make the correction and close the hiatus might well be compared to "*an old chap who owned a small ranch through which a stream ran, and he had signs all over it, 'No trespassing'; and one day he himself fell in and a stranger went in and rescued him, and then he turned around and had the stranger arrested for trespassing on his property.*" (Congressional Record, Vol. 80, page 3971.) (Italics supplied.")

Mr. Hollister without speaking a parable made the point equally vivid when he said:

> "Of course, if the bill is not passed, the States have the right under the decision of the Supreme Court in the Maryland case to tax preferred stock in national banks. The bill removes that right. But that is only a right which has existed since the Reconstruction Finance Corporation came into being. *There is no taking away any right which the State had before the Reconstruction Finance Corporation stepped into the picture.*" (Congressional Record, Vol. 80, page 4057.) (Italics supplied.)

Mr. Wolcott on the day before had already said this:

> "When we passed the original Reconstruction Finance Corporation Act, we exempted from local taxation their franchise, their own stock, their income, and everything except their holdings. I believe it was the intention of the Congress at that time to include the holdings of the Reconstruction Finance Corporation and, as I view this bill, it is merely an attempt on our part to clarify what was

very apparently our intention when the original Reconstruction Finance Corporation Act was passed." (Congressional Record, Vol. 80, page 3966.)

To go on would extend these quotations from the Congressional Record until they become tiresome. Congress was eagerly determined to promptly correct its inadvertent omission and exempt the preferred shares in national banks which the earlier act had failed to accomplish.

ARIZONA CONSTITUTION
ARTICLE 5

Sec. 1. (Executive officers.)—The executive department of the state shall consist of governer, secretary of state, state auditor, state treasurer, attorney-general, and superintendent of public instruction, each of whom shall hold his office for two years beginning on the first Monday of January next after his election, except that the terms of office of those elected at the election provided for in the Enabling Act approved June 20, 1910, shall begin when the state shall be admitted into the Union, and shall end on the first Monday in January, A. D. 1913, or when their successors are elected and qualified.

The persons, respectively, having the highest number of votes cast for the office voted for shall be elected; but if two or more persons shall have an equal and the highest number of votes for any one of said offices, the two houses of the legislature at its next regular session shall elect forthwith, by joint ballot, one of such persons for said office.

The officers of the executive department during their terms of office shall reside at the seat of government, where they shall keep their offices and the public records, books, and papers. They shall perform such duties as are prescribed by this constitution and as may be provided by law.

ARTICLE 12

Sec. 1. (Counties to be bodies politic.)—Each county of the state, now or hereaffer organized, shall be a body politic and corporate

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Sec. 4-502. Duties.—The attorney-general shall:

1. Devote his entire time to the discharge of the duties of his office and not engage directly or indirectly in the private practice of law;

2. Appear in the Supreme Court and prosecute or defend all causes therein to which the state, or any officer thereof in his official capacity, is a party; and when required by the governor to appear for the state or any officer thereof, and prosecute or defend in any other court any cause wherein the state is a party or is interested;

3. Exercise supervisory powers over the county attorneys in all matters pertaining to their offices, and may require of them reports as to the condition of their public business; and may, when he deems the same necessary, and shall when directed by the governor, assist the county attorney of any county in the discharge of his duties;

4. Keep a docket of all causes in which he is required to appear, fully showing the condition of such cause, and the proceedings therein, and the proceedings subsequent to judgment, and the reasons for the delay of execution, if any, and keep a record of all money or property by him received, and disbursements made;

5. Give his opinion in writing to the legislature or either house thereof, to any state officer and to any county attorney, when required, upon any question of law relating to their offices;

6. Purchase in the name of the state and under the direction of the governor any property offered for sale under execution issued upon judgments in favor of or

for the use of the state, and to enter satisfaction in whole or in part, of such judgments, as the consideration for such purchases, and if the property of such judgment debtor has been sold under a prior judgment, or is subject to any prior judgment, lien or encumbrance, under the direction of the governor, to redeem such property from such prior judgment, lien or encumbrance; all sums of money necessary for such redemption must, upon the order of the governor, be paid out of any money appropriated for such purpose;

7. Perform such other duties as may be required by law, and report to the governor annually on or before the first day of January;

8. Appear for the state in any action in the courts of the United States, and the costs thereof and the expenses of the attorney-general incurred therein shall be a legal charge against the state; and

9. Institute investigation for the discovery of all property which may have or would escheat to the state, and for that purpose he may cite any person before the superior court to answer investigations, produce books and render accounts concerning said property, and institute action in the superior court of the county where the property is situate, for the recovery of escheats. He may require any county attorney to conduct any such proceedings.

Sec. 4-503. Legal advisor of departments.—The attorney-general shall be the legal advisor of all departments of the state, and shall give such legal service as such departments may require. With the exception of the industrial commission, no official, board, commission, or other agency of the state, other than the attorney-general, shall employ any attorney or make any expenditure or incur any indebtedness for legal services. The attorney-general may, when the business of the state requires, employ assistants.

Sec. 12-704. Salaries in first class counties—In counties of the first class, the county officers shall receive

the following annual salaries: Clerk of the superior court, Twenty-seven hundred dollars ($2,700); sheriff, four thousand dollars ($4,000); recorder, twenty-seven hundred dollars ($2,700); treasurer and ex officio tax collector, three thousand dollars ($3,000; county attorney, three thousand dollars ($3,000); assessor, twenty-seven hundred dollars ($2,700); superintendent of schools, twenty-four hundred dollars ($2,400) and actual and necessary traveling expenses not to exceed five hundred dollars ($500) per annum; chairman board of supervisors, fifteen hundred dollars ($1,500); members board of supervisors, twelve hundred dollars ($1,200) each. Each of said officers other than the board of supervisors and the superintendent of schools shall appoint one (1) chief deputy, to receive a salary agreed upon by the officer appointing the deputy and the board of supervisors, but not less than the following, nor in excess of twenty-five (25) per cent of the following: Deputy clerk of the superior court, eighteen hundred dollars ($1,800); deputy sheriff, twenty-one hundred dollars ($2,100); deputy recorder, eighteen hundred dollars ($1,800); deputy treasurer and ex officio tax collector, eighteen hundred dollars ($1,800); deputy county attorney, two thousand dollars ($2,000); deputy assessor, eighteen hundred dollars ($1,800); deputy superintendent of schools, eighteen hundred dollars ($1,800). The board of supervisors shall appoint a clerk, to receive an annual salary of twenty-four hundred (2,400) dollars. Members of the boards of supervisors in counties having a population of ninety thousand (90,000) or over shall receive each twenty-four hundred dollars ($2,400) per year; provided, however, that the chairman of said boards of supervisors shall each receive twenty-seven hundred dollars ($2,700) per year.

Sec. 12-709. Legal salary only to be received and in full, payable semi-monthly.—The salaries provided in this chapter shall be in full compensation for all services rendered by any officer, deputy or assistant.

Salaries shall be paid twice in each month on regular days not more than sixteen (16) days apart. All state or county officers, employees, members of boards and commissions not mentioned in this chapter, and all deputies, stenographers, clerks and employees of any officer, board or commission, or of any institution, shall receive the salary provided by the laws creating or authorizing their respective positions, and shall not, under any pretext, receive any salary or emolument in excess of the salary so provided by law.

Sec. 17-201. County a body corporate—Name of county, corporate name.—Every county is a body politic and corporate, and the name of the county designated in this chapter is its corporate name, by which it must be known and designated in all actions and proceedings.

Sec. 17-202. Powers—Its powers can be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law. It has the power to sue and be sued; to purchase and hold lands within its limits; to make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers; to make such orders for the disposition or use of its property as the interests of its inhabitants require, and to levy and collect such taxes for purposes under its exclusive jurisdiction as are authorized by law.

Sec. 17-203. Industrial pursuit—Election to determine bond issue.—The board of supervisors may, and upon petition for fifteen (15) per cent of the property taxpayers of the county, who are also qualified electors, shall call an election of such taxpayers to determine whether the bonds of said county shall be issued and sold for the purpose of constructing, installing and operating an industrial plant for the manufacture of ma-

terials or commodities for use in the construction of public highways or other public works of the county. Whenever the bonds of any county shall be authorized at said election and issued and sold, then said county shall have power to own or lease and operate the plants for which said bonds were so authorized, in any county of the state. Said election shall be called and conducted and the results returned and canvassed as in other county bond elections. The bonds shall be sold by the board in the same manner as other county bonds. The proceeds shall be placed in a special fund in the county treasury, as the "County Industrial Pursuits Fund" and shall be used only for the purposes for which said bonds were authorized.

Sec. 17-204. Construction and operation of plant.—When the proceeds of said bonds are in the treasury, the board of supervisors shall prepare plans and specifications for the plant and equipment, and thereupon shall advertise for bids for the construction and installation of said plant and equipment, in accordance with said plans and specifications by publishing a notice calling for bids thereon, for ten (10) days in a daily or two (2) weeks in a weekly newspaper. The contract shall be let to the lowest responsible bidder, who shall give security for the faithful performance of said contract, in such amount as the board determines; provided, said board may contract for any part of said work the cost of which does not exceed one thousand dollars ($1,000), without calling for bids. The board may reject any and all bids received and may readvertise.

Sec. 17-205. Engineer and manager.—The board may employ engineers and other employees to assist said board and to draft the plans and specifications, and shall employ a manager to have charge of the operation and maintenance of said plant to be skilled in the line of his duties and required to give bond for the faithful performance of his duties, in such amount as the board requires. Such manager and all engineers

and other employees necessary for the establishment and operation of such plant shall be paid salaries fixed by the board.

Sec. 17-206. Sale of products of plant.—The products of the plant shall be furnished to any board or officer of the county for the construction of any public improvement for the county, at a price based on the cost of manufacture including the taxes levied upon the bonded indebtedness; and such board or officer may purchase such products without advertisement for bids and pay for them out of the funds available for such county work. The products may also be sold, or exchanged for other materials required for public improvements, to other counties and persons; provided, that the price when sold for private purposes shall be the same to all persons for any given quantity, and not less than the price then charged the board or officer of the county.

Sec. 17-502. Enumeration of officers.—The officers of the county are: Sheriff, recorder, treasurer, school superintendent, county attorney, assessor, supervisors, clerk of the board of supervisors, tax collector, and clerk of the superior court. The county treasurer shall be ex officio tax collector.

Sec. 17-505. Terms of office—Treasurer succeeding himself.—County and precinct officers, for whose election and term of office no other provision is made, shall be elected at the general election, and shall hold office for the term of two (2) years from the first day of January next after their election. Only one (1) person shall be elected to any office to which are attached other offices ex officio. The treasurer shall not be elected to succeed himself for more than one (1) succeeding term.

XV.

Sec. 17-902. Duties.—The county attorney is the public prosecutor of the county and shall:

1. Attend the superior and other courts within the county, and conduct, on behalf of the state, all prosecutions for public offenses;

2. Institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when he has information that such offenses have been committed; and, when not engaged in criminal proceedings in the superior court, attend upon the magistrates in cases of arrest, when required by them, and attend before, and give advice to, the grand jury;

3. Draw all indictments and informations, defend all actions brought against the county, prosecute all recognizances forfeited in the courts of record, and all actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or his county;

4. Deliver receipts for money or property received in his official capacity and file duplicates thereof with the clerk of the board of supervisors;

5. On the first Mondays of January, April, July and October in each year, file with the board of supervisors on account, verified by his oath, of all money received by him in his official capacity during the preceding three (3) months, and at the same time pay it over to the county treasurer;

6. Give, when required, his opinion, in writing, to county officers on matters relating to the duties of their offices;

7. Keep a register of official business, and enter therein every action, criminal or civil, prosecuted officially, and of the proceedings therein;

8. Act as the legal advisor to the board of supervisors, attend their meetings, and oppose claims against the county which he deems unjust or illegal; and,

9. Act as attorney for all school districts and the boards of trustees thereof.

Sec. 73-204. Assessment of property and shares of stock in corporations—Banking, building and loan associations or corporations, and finance corporations.—The property of corporations shall be assessed and taxed and no assessment shall be made of the shares of stock of corporations, nor shall any holder thereof be taxed for such shares. The foregoing provision shall not apply to a banking corporation, building and loan associations or corporations, and a corporation or association engaged in the business of using money wherewith to make money for the owners of its shares, the shares of stock of which shall be assessed and taxed as other property, in the name of the shareholders of the several shares thereof, to be entered and taxed in the name of, and be payable by, such corporation or association.

Sec. 73-205. Statement to assessor by banking corporation and shareholders—Tax payable by corporation. Upon the demand of the assessor, the officers in charge of any such banking corporation or such corporation or association engaged in the business of using money wherewith to make money, shall make out and deliver to said assessor a sworn statement showing the number of shares, the name and residence of each shareholder, and the number of shares owned by him; the surplus, reserve fund, and undivided profits; and the par and marked value of the shares. The full cash value of such shares shall be ascertained according to the best information which the assessor may be able to obtain, whether from any return made to any officer of the state or the United States, from actual sales of the stock, or from other trustworthy sources. Every such shareholder shall, where such corporation or association is located, render at their full cash value to the assessor all shares owned by him therein, and if the

shareholder fail to do so, the assessor shall list and assess such unrendered shares as other unrendered property. The taxes due thereon shall be paid by such corporation or association, and shall be a lien against and assessed to such shares of stock, and no such corporation or association shall pay any dividends to any shareholder who is in default in the payment of taxes due on his shares, nor shall it permit the transfer on its books of any shares the owner of which is in default in the payment of his taxes on the same.

Sec. 73-817. Purchase of property sold to state.—Whenever any real property shall be sold to the state as herein provided, the county treasurer shall sell, assign and deliver the certificate of purchase issued therefor to any person who shall pay to the county treasurer hte whole amount then due under such certificate, including interest, penalties and charges, and who shall in addition pay the whole amount of any subsequent taxes assessed on the real property described therein and the further sum of fifty cents (50c) for making each such assignment.

Sec. 73-838.—List of real estate held by state under tax deed—Notice of sale.—The board of supervisors, on or before the first Monday of November, in each year, shall prepare a list of the real estate within such county held by the state by tax deed, giving a full description of each tract, together with the name of the former owner thereof, if known, and the total amount of taxes, penalties, and costs, including the unpaid charges of the county treasurer and recorder, and shall advertise the same for sale at private sale at the office of the board. Such advertisement shall be by publication of said list and notice of sale in a newspaper published in the county, at least once a week for four (4) weeks, or oftener, if the board so directs; by posting in two (2) or more public places in each election precinct wherein any of said real estate is situated, and by keep-

ing such notice and list, as revised from time to time, continuously posted in the office of the board of supervisors, in the sheriff's office, and at the front door of the county court house.

Sec. 73-839. Sale of property held by state.—The board of supervisors may, after such advertisement, sell such real estate to the highest bidder for cash, and upon such sale shall execute and deliver to the purchaser, at his cost, a deed conveying to him the title of the state in and to the tract so purchased. The deed shall be acknowledged by the chairman and clerk of the board. The purchase money shall be paid to the county treasurer, who shall distribute and credit the same to the several funds entitled thereto. Should any such real estate be not sold before the time for the next succeeding publication thereof, the board may omit the same therefrom.